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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/637,455	08/08/2003	Jennifer A. Gaul	410058	3437

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LATHROP & GAGE LC
4845 PEARL EAST CIRCLE
SUITE 300
BOULDER, CO 80301

EXAMINER

TRAN LIEN, THUY

ART UNIT	PAPER NUMBER
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1794

MAIL DATE	DELIVERY MODE
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12/07/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/637,455	Applicant(s) GAUL ET AL.	
	Examiner Lien T. Tran	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 01 October 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 5-16 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 5-16 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

Art Unit: 1794

Claims 5-16 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

In the amendment filed 10/1/07, applicant amends all independent claims to include the limitation "the composition contains less than about 1wt% dried milk or the donut contains less than about 1wt% dried milk". This limitation is not supported by the original disclosure because the range now claimed is not disclosed. Paragraphs 0051, and 0053 disclose the presence of Arise 500 and the replacing of all the NFDM with Arise 5000 and set 7 discloses .92% NFDM and 1,83 Arise 5000, but the range now claimed is not disclosed. The amount of .92% is less than 1%, but the range includes amounts that are not disclosed such as .25, .27, .45 etc... With respect to claim 16, the limitation of "baking said donut on a greased cooking surface" is not disclosed in the specification. Paragraph 0032, discloses "in the preparation of the food product containing the wheat protein isolate, the food product would come in direct contact with oil; the cooking process would thereby employ frying or baking". This paragraph does not disclose at what stage the food product comes in contact with oil and there is absolutely no disclosure that the donut is baked on a greased cooking surface. With respect to claim 13, there is also no disclosure of substituting wheat protein isolate in the range of .5-10% for dried milk. The only disclosure of substituting wheat protein isolate for dried milk is in paragraph 0053, no. 3 and the amount is 2.75%.

Art Unit: 1794

The new rejection is necessitated by amendment.

Claims 5-9, 11,12, 13-14, 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Murphy et al.

Murphy et al disclose a composition comprising wheat protein. The protein is present in amount of at least .1 parts per 100 parts of flour. When the protein is present in an aqueous dispersion that is added to a flour or batter formulation, the protein in the dispersion amount to .1-8 parts per 100 parts of flour. The composition is added to dough or batter to make reduce-fat or fat free baked goods such as doughnuts, cakes, cookies etc... The wheat protein can be wheat protein isolate. (see col. 1 lines 45-62, col. 3 lines 32-36, col. 5 lines 15-26 and col. 7 lines 17-23)

Murphy et al do not disclose the dried milk content as claimed. With respect to the method, Murphy et al do not disclose substituting wheat protein isolate for dried milk, the dried milk content as claimed and baking on greased cooking surface.

As shown by the examples in Murphy, the level of dried milk varies depending on the type of product made. Dried milk is a nutritious product that is added to many types of food products. It would have been obvious to one skilled in the art to determine the optimum amount of dried milk depending on the type of product made and the nutritional profile desired. The amount used is a result-effective variable which can readily be determined by one skilled in the through routine experimentation. While claim 13 recites substituting wheat protein isolate for dried milk, both proteins are present in the product and Murphy disclose adding both proteins to the product. The amount of wheat protein isolate in Murphy falls within the range claimed. Murphy et

Art Unit: 1794

disclose donuts; thus, it would have been obvious to one skilled in the art to make cake donut because that is a conventional type of donut. Murphy discloses baking the product, it would have been obvious to grease the baking surface such as a baking pan to facilitate removal of the product from the pan. It is notoriously well known in the art to do this.

Claims 8-9, 11-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fischer et al in view of Murphy et al.

Fischer et al disclose a fried food product. The product is made from a dough which is formed into a donut and fried to form the fried food product. (see example 1)

Fischer et al do not disclose adding wheat protein isolate in the amount claimed and the amount of dried milk.

Murphy et al teach to add a composition comprising hydrocolloid and protein to baked goods including donut to improved texture, mouthfeel, softness, moistness, moisture-retention, shelf-life, flavor enhancement, fatty attribute and volume. The composition takes away the inclusion of overtly added fat material such as shortening from the dough. The protein includes wheat protein isolate. (col. 1 lines 45-55, col. 4 lines 50-60, col. 7 lines 17-21)

It would have been obvious to one skilled in the art to add the composition disclosed by Murphy et al to the Fischer et al composition to obtain the benefits disclosed by Murphy et al. Murphy et al disclose the food products in which the composition is used include donut; thus, its addition to the Fischer et al product is totally compatible and enhances the properties of the Fischer et al product. The addition of

Art Unit: 1794

the composition takes away the need to add shortening in the Fischer et al composition which will decrease the overall fat content of the product. As to the amount of dried milk, example 1 shows a dried milk content of 1.75% which is very close to about 1%. ,Furthermore, the level of dried milk varies depending on the type of product made. Dried milk is a nutritious product that is added to many types of food products. It would have been obvious to one skilled in the art to determine the optimum amount of dried milk depending on the type of product made and the nutritional profile desired. The amount used is a result-effective variable which can readily be determined by one skilled in the through routine experimentation.

Claims 13-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fischer et al in view of Green et al.

Fischer et al disclose a fried food product. The product is made from a dough which is formed into a donut and fried to form the fried food product. (see example 1)

Fischer et al do not disclose adding wheat protein isolate in the amount claimed and the amount of dried milk as claimed.

Greene et al teach to use flour with high protein content or to add proteinaceous substance such as wheat gluten to noodle dough which is subjected to frying. The addition of the protein lower the amounts of oil up-take. The amount of protein added is up to about 5% based upon the weight of the flour employed. (see col. 5 lines 5-18)

It would have been obvious to add wheat protein in the amount taught by Greene et al to the Fischer et al composition to obtain the benefit taught by Green et al to reduce the fat content of the product. It would have been obvious to use wheat protein

Art Unit: 1794

isolate when desiring a more concentrated and purer protein material. While claim 13 recites substituting wheat protein isolate for dried milk, both proteins are present in the product. When wheat protein is added, the product of Fischer et al contains both protein. As to the amount of dried milk, example 1 shows a dried milk content of 1.75% which is very close to about 1%. Furthermore, the level of dried milk varies depending on the type of product made. Dried milk is a nutritious product that is added to many types of food products. It would have been obvious to one skilled in the art to determine the optimum amount of dried milk depending on the type of product made and the nutritional profile desired. The amount used is a result-effective variable which can readily be determined by one skilled in the through routine experimentation.

In the response filed 10/1/07, applicant argues the 102 rejection over Murphy. This argument is moot because the 102 rejection is withdrawn due to the amendment to the claims.

With respect to the 103 rejection over Fischer, applicant argues Fischer discloses from about 1.5-2 milk solid which is not the amount claimed. Fischer discloses about 1.5-2 which is very close to about less than 1% as claimed. In any event, the level of dried milk varies depending on the type of product made and even in the same type of product as shown by Fischer. Dried milk is a nutritious product that is added to many types of food products. It would have been obvious to one skilled in the art to determine the optimum amount of dried milk depending on the type of product made and the nutritional profile desired. The amount used is a result-effective variable which can

Art Unit: 1794

readily be determined by one skilled in the through routine experimentation. Applicant has not shown any unexpected result or criticality with respect to the amount claimed.

With respect to the rejection of claims 13-15, applicant argues that the use of a concentrated or purified ingredient generally reduces the amount of the ingredient required in a recipe. This argument is not supported by factual evidence. Applicant has not shown that the use of a purified product reduces the amount of ingredient used. Applicant further argues neither Fischer nor Greene disclose substituting a wheat protein isolate for dried milk. While the claim recites substituting, both proteins are included in the product. When wheat protein is added, the product of Fischer et al contains both proteins and the rejection sets forth why one would be motivated to add the wheat protein as taught by Greene. Applicant argues Greene and /or Fischer also lack a teaching or suggestion of how a proteinaceous ingredient would be incorporated into a donut. Fischer teaches adding protein such as NFMS to the ingredients for making the donut; thus, when wheat protein is added, it would have been obvious to add the protein to the ingredients that are used to make the donut. While the claim recites substituting, both proteins are added; thus, it is interpreted as adding both proteins to the donut and the amount of protein as taught by Greene falls within the range claimed. Greene is relied upon for teaching of adding wheat protein to reduce oil absorption; it is not relied upon for the teaching of adding dried milk. Thus, whether or not the noodle contains dried milk is not an issue to be considered. Applicant also argues Fischer is seeking to reduce economic costs and would teach away from incorporation of expensive ingredients. While Fischer does teach a more economical

Art Unit: 1794

method, there is no teaching away from using expensive ingredient. Even if wheat protein is expensive, one would still be motivated to use it if such ingredient is known to give a decided benefit such as reduction in fat absorption.

Applicant's arguments filed 10/1/07 have been fully considered but they are not persuasive.

The changes in the rejection are necessitated by amendment.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T. Tran whose telephone number is 571-272-1408. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1794

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

December 3, 2007

Lien Tran
LIEN TRAN
PRIMARY EXAMINER
Group 1700